[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 228.

BERT ROSS, APPELLANT,

vs.

MARTIN AGUIRRE, WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA AT SAN QUENTIN, CALIFORNIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Petition for writ of habeas corpus	1	1
Commitment	1	1
Judgment	3	2
Proceedings concerning drawing of grand jury	6	4
Order denying petition for writ of habeas corpus, January 2, 1902	10	6
Certified copy of record from the supreme court of the State of California.	11	6
Petition for writ of habeas corpus	11	6
Commitment	11	6
Judgment	13	7
Proceedings concerning drawing of grand jury	16	9
Petitioner's authorities	20	12
Petition for writ of error	22	12
Assignment of errors	23	13
Clerk's certificate	24	13
Order denying petition for writ of habeas corpus, January 6, 1902	25	14
Order allowing appeal, etc	25	14
Petition for appeal and allowance of same	27	15
Assignment of errors	28	15
Bond on appeal	30	16
Affidavit of poverty	32	17
Order that clerk's services be performed without cost	33	17
Affidavit of service of citation	34	18
Clerk's certificate	35	18
Citation and service	36	19

1 COMPLAINT AND PETITION FOR WRIT OF HABEAS CORPUS.

In the circuit court of the United States for the northern district of California.

In the matter of Bert Ross, on habeas corpus.

To the honorable the judges of the circuit court of the United States for the northern district of California:

The complaint of Bert Ross respectfully shows:

That he is restrained of his liberty by Martin Aguirre, who is the warden of the State prison of the State of California, at San Quentin, California, and is by the said warden now confined in said prison in violation of the fourteenth amendment to the Constitution of the United States.

That the said warden so detains him in his custody in said prison solely by virtue of a certain commitment issued out of the superior court of the county of San Luis Obispo, State of California, on the 9th day of November, 1901, of which the following is a copy:

"Superior court of the State of California, county of San Luis Obispo.

"THE PEOPLE OF THE STATE OF CALIFORNIA, plaintiff,
vs.
BERT ROSS, DEFENDANT.

"The district attorney and the defendant in above entitled cause with his counsel being present in court and no sufficient cause being alleged or shown or appearing to the court why this court should not
2 make an order fixing the time when the judgment heretofore pronounced in this cause shall be executed, and further requiring the sheriff of San Luis Obispo County, California, to deliver the defendant, Bert Ross, to the warden of the State prison of the State of California, at San Quentin, in the county of Marin, State aforesaid, and further requiring said warden to so execute said judgment at such a time to be so fixed, and no legal reason having been shown to exist against the execution of the said judgment, and there being no legal reason against the execution of the said judgment;

"And whereas you, Bert Ross, have been duly convicted in this court of the crime of murder of the first degree, upon the verdict duly found in said cause, as follows, to wit: 'We, the jury in the above-entitled cause, do find the defendant, Bert Ross, guilty of murder of the first degree as charged in the indictment, and in our judgment he should be punished by the infliction of the death penalty.

"'P. O'LEARY, *Foreman.*'

"And whereas upon said verdict the judgment aforesaid was upon proceedings duly had, pronounced by this court, which judgment has become and now is final, and is in full force and effect;

"And whereas the day heretofore fixed for the execution of said judgment has passed and said judgment has not been executed:

"It is ordered that you, Bert Ross, be taken hence by the sheriff of the county of San Luis Obispo, State of California, and be by him

detained in close confinement in the county jail of said county, and within ten days from this date the said sheriff is ordered and directed to deliver you, Bert Ross, to the warden of the State prison of the State of California at San Quentin, in the county of Marin, State of California, and after such delivery to said warden that you, said Bert Ross, be kept and detained in said State prison at San Quentin by the warden thereof in close confinement until Friday, the tenth day of January, 1902, and on the said day, between the hours of sunrise and noon of said day, that the said judgment be carried into execution, and that you, Bert Ross,
3 for the wilfull, deliberate, and premeditated murder of Will J. Ward, of which you have been duly convicted, be by the said warden of the said State prison aforesaid, and within the walls of said State prison, hanged by the neck until you shall be dead. And may God have mercy on your soul.

"E. P. UNANGST, *Judge.*

"Dated November 9, 1901."

That the judgment referred to in said commitment is a judgment which was, on the 23rd day of May, 1900, rendered in the said superior court, of which judgment the following is a copy:

"*Judgment.*

"In the superior court of the State of California, in and for the county of San Luis Obispo.

"Tuesday, May 15, 1900. Present: Hon. E. P. Unangst, judge; E. C. Ivins, sheriff; John Whicher, clerk.

"THE PEOPLE OF THE STATE OF CALIFORNIA,
vs.
"BERT ROSS.

"This being the time fixed by the court for passing judgment, and district attorney, defendant, and his counsel, Graves & Graves, being present in court, the court made the following statement: 'In this case, you, Bert Ross, was indicted by the grand jury of the county of San Luis Obispo, State of California, by indictment duly found, returned, presented, and filed in this court on December 22d, 1899, by said grand jury, charging you, Bert Ross, with the crime of felony, to wit, murder, in that you did wilfully, unlawfully, feloniously, and with malice aforethought, kill and murder one Will J. Ward, a human being, as alleged and set forth and charged in said indictment, and upon this indictment in this court, on January 27th, 1900, you then and there being present with your counsel, was duly arraigned, and in said court thereafter, on, to wit, February 5th, 1900, you then and there being present
4 with your counsel, entered the plea of not guilty of the offense charged in said indictment; and on this plea trial was had, a jury impaneled, and on the 5th day of May, A. D. 1900, the jury in said cause returned into this court the verdict: We, the jury in the above-entitled cause, do find the defendant, Bert Ross, guilty of murder of the first degree, as charged in the indictment, and in our judgment he should

be punished by the infliction of the death penalty. P. O'Leary, foreman. And thereupon, in open court, an order was made fixing May 15th, 1900, at 1:30 p. m., as the time for pronouncing judgment on said verdict. Have you any legal cause to show why judgment should not be pronounced against you? On motion of defendant, through his counsel, passing of judgment is continued until May 19th, 1900, at 9:30.'

"Wednesday, May, 23, 1900. Court opened at 10 o'clock. Present: Hon. E. P. Unangst, judge; John Whicher, clerk; E. C. Ivins, sheriff. (Title of court and cause.)

"The district attorney, defendant, and his counsel being present in court, defendant makes a motion in arrest of judgment, which is argued, submitted, and denied. The defendant then moves for a new trial, on grounds stated in motion, and for the time in which to secure and present affidavits as to newly discovered evidence; argued, submitted, and denied.

"No sufficient cause been alleged or shown or appearing to the court why judgment should not be pronounced, the court now renders its judgment: 'That whereas you, Bert Ross, have been duly convicted in this court of crime of murder of the first degree, upon the verdict duly found in said court as follows, to wit: We, the jury in the above-entitled cause, do find the defendant, Bert Ross, guilty of murder of the first degree as charged in the indictment, and in our judgment he should be punished by the infliction of the death penalty. P. O'Leary, foreman. It is therefore ordered, adjudged, and decreed, and the judgment of the law and the sentence of this court is now pronounced as follows: The judgment of the law and the sentence of the court is that you, Bert
4 Ross, be taken hence by the sheriff of the county of San Luis Obispo, State of California, and be by him detained in close confinement in the county jail of said county, and within ten days from this date the said sheriff is ordered and directed to deliver you to the warden of the State prison of the State of California at San Quentin, in the county of Marin, State of California, and after such delivery to said warden, that you, Bert Ross, be kept and detained in said State prison at San Quentin by the warden thereof in close confinement, until such day as shall hereafter be designated and fixed in the warrant of execution to be issued herein; and on the day so designated and fixed in said warrant of execution, and between the hours therein named, that you, Bert Ross, for the willful, deliberate, and premeditated murder of Will J. Ward, of which you have been duly convicted, be by the said warden of the said State prison aforesaid, and within the walls of said State prison, hanged by the neck until you shall be dead. And may God have mercy on your soul."

That the said judgment and the said order of the said court, so made on the 9th day of November, 1901, and the said commitment based thereon, are and each of them is wholly void and of no effect by reason of the following matters:

That by the constitution of the said State of California (Art. I, sec. 8) no person can be convicted of a capital offense except upon the indictment of a grand jury or upon an information after examination and commitment by a magistrate; and the law of said State authorizes prosecution for such offenses only upon such indictment or information.

That by the law of said State (C. C. P., secs. 204, 205, 208, 209, 211, 241, 242) a grand jury is required to be drawn by the superior court by selection in the manner provided by law from a list of names selected and certified to such court by the board of supervisors of the county. Nevertheless, the said court did not draw or select any grand jury from any list of names so selected by the board of supervisors of said
6 county; but, without authority of law, itself selected the names of certain persons not on any list selected or certified by said board of supervisors, and from the said list of names so selected by said court, and without authority of law, drew a grand jury, which proceedings of said court are set forth in the records of said court as follows:

(Title.)

"In the matter of grand jurors for the ensuing year of 1899.

"It is hereby ordered that the estimated number of grand jurors required for the transaction of the business of the said court during the ensuing year of 1899, be and is hereby fixed and designated at thirty-five (35).

"Dated January 28, 1899.

"E. P. UNANGST, *Judge.*

(Endorsed:) "Filed Jan'y 28, 1899.

"JOHN WHICHER, *Clerk.*

"By WM. MALLAGH, *Deputy.*"

(Title.)

"In the matter of the grand jurors for the ensuing year of 1899.

"In accordance with and in pursuance of the order heretofore this day made in the above-entitled matter, the following electors of San Luis Obispo County, California, having all the qualifications and being suitable and competent persons to serve as grand jurors, are hereby selected as the persons from whom shall be drawn grand jurors to serve in the Superior court for the ensuing year of 1899." [Here follows a list showing the names of thirty-five persons, and their place of residence in said county.]

"Dated January 28th, 1899.

"E. P. UNANGST, *Judge.*

(Endorsed:) "List of names selected by Judge E. P. Unangst to serve for ensuing year 1899.

"Filed Jan'y 28, 1899.

"JOHN WHICHER, *Clerk.*

"By WM. MALLAGH, *Deputy.*"

7 (Title.)

"By the court: Whereas the business of our superior court aforesaid requires the attendance of a grand jury, and no grand jury being in attendance upon said court, it is

"Ordered that twenty-five grand jurors be drawn, in the manner required by law, and be summoned by the sheriff of said county to be and appear before said court, at the court room thereof, on Monday, December the 11th, 1899, at ten o'clock a. m., to act as grand jurors.

"It is further ordered that said drawing take place at the hour of ten o'clock a. m., November the 22d, 1899.

"Done in open court this 21st day of November, 1899, at 3.15 o'clock p. m.

"E. P. UNANGST, *Judge.*

"Attest: JOHN WHICHER, *Clerk.*

[SEAL.]

(Endorsed:) "Order for grand jury. Filed Nov. 21, 1899. John Whicher, clerk. By Wm. Mallagh, deputy."

That from the twenty-five names so selected and drawn by said court the said court proceeded to empanel and did empanel an alleged grand jury, which body so empaneled found against the defendant the indictment mentioned in said judgment; and the said defendant in said action was tried and convicted upon said indictment and not otherwise, and not upon any other indictment, nor upon any information whatsoever.

That by the law of the State of California an indictment found by a body of men not lawfully empaneled as a grand jury is void, and any judgment rendered thereupon is beyond the jurisdiction of the court and void (*Bruner* v. *Superior Court*, 92 Cal., 239; *People* v. *Thurston*, 5 Cal., 69; *Levy* v. *Wilson*, 69 Cal., 105). Furthermore, by the law of said state a defendant is entitled to challenge the panel of a grand jury for one or more of the following causes only: that the requisite number of ballots was not drawn from the jury box of the county; that
8 notice of the drawing of the grand jury was not given, or that the drawing was not had in the presence of the officers designated by law; and if convicted the defendant cannot, upon appeal, present to the supreme court the question of whether such grand jury was otherwise legally selected, drawn, or empaneled, nor can a judgment of conviction be reversed on appeal on account of any objection to such panel, except such objections as may so be raised by challenge to such panel. (*P. C.*, secs. 894, 895; *Bruner* v. *Superior Court supra*, *People* v. *Southwell*, 46 Cal., 141; *People* v. *Welch*, 49 Cal., 174; *People* v. *Colby*, 54 Cal., 37; *People* v. *Hunter*, 54 Cal., 65.)

By reason of the matters aforesaid the said judgment and conviction are wholly void, and do not constitute due process or any process of law by which the same can be enforced against your petitioner; yet, nevertheless, the said warden continues to hold your petitioner in custody by authority of the same, and will, if your petitioner be not sooner discharged from his custody, take the life of your petitioner on the 10th day of January, 1902; and your petitioner has no remedy by appeal nor in the ordinary course of law.

May it, therefore, please your honors to grant to your petitioner a writ of habeas corpus directed to the said Martin Aguirre, requiring him to bring the body of your petitioner before your honorable court with the true cause of his detention, and that thereupon your honorable court do discharge your petitioner from the custody aforesaid.

BERT ROSS, *Petitioner.*

STATE OF CALIFORNIA,
County of Marin, ss:

BERT ROSS, being duly sworn, deposes and says that he is the
9 petitioner above named and that the facts set forth in the foregoing complaint are true.

BERT ROSS.

Subscribed and sworn to before me this 31st day of December, 1901.
[SEAL.] F. W. REYNOLDS,
Notary Public in and for Marin County, Cal.

(Endorsed:) No. 13191. In the circuit court of the United States for the northern district of California. In the matter of Bert Ross on habeas corpus. Complaint & petition for writ of habeas corpus. Filed January 2, 1902, Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

10 *Order denying application for writ of habeas corpus.*

At a stated term, to wit, the November term, A. D. 1901, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Thursday, the 2nd day of January, in the year of our Lord one thousand nine hundred and two.
Present: The Honorable William W. Morrow, circuit judge.

In the matter of Bert Ross on habeas corpus. No. 13191.

In this matter W. C. Van Fleet and W. B. Treadwell, esqs., attorneys for Bert Ross, appeared in open court, and having been granted leave in that behalf, filed and presented to the court the petition of said Bert Ross for a writ of habeas corpus and submitted the same to the court for its consideration. And the same having been fully considered, it was ordered that the petition of said Bert Ross for a writ of habeas corpus herein be, and the same hereby is, denied upon the ground that application for relief on behalf of said Bert Ross should first be made to the courts of the State of California.

11 *Certified copy of record from supreme court of the State of California.*

S. F. No. In the supreme court of the State of California.

In the matter of Bert Ross on habeas corpus.

To the honorable the supreme court of the State of California:

The petition of William Graves respectfully shows to the court:
That the said Bert Ross is restrained of his liberty by Martin Aguirre, who is the warden of the state prison of the State of California, at San Quentin, California, and is by the said warden now confined in said prison in violation of the fourteenth amendment to the Constitution of the United States.
That the said warden so detains the said Bert Ross in his custody in

said prison solely by virtue of a certain commitment issued out of the superior court of the county of San Luis Obispo, State of California, on the 9th day of November, 1901, of which the following is a copy:

"Superior court of the State of California, county of San Luis Obispo.

"THE PEOPLE OF THE SATE OF CALIFORNIA, PLAINTIFF,
vs.
BERT ROSS, DEFENDANT.

12 "The district attorney and the defendant in above entitled cause with his counsel being present in court and no sufficient cause being alleged or shown or appearing to the court why this court should not make an order fixing the time when the judgment heretofore pronounced in this cause shall be executed, and further requiring the sheriff of San Luis Obispo County, California, to deliver the defendant, Bert Ross, to the warden of the State prison of the State of California, at San Quentin, in the county of Marin, State aforesaid, and further requiring said warden to so execute said judgment at such a time to be so fixed, and no legal reason having been shown to exist against the execution of the said judgment, and there being no legal reason against the execution of the said judgment;

"And whereas you, Bert Ross, have been duly convicted in this court of the crime of murder of the first degree, upon the verdict duly found in said cause, as follows, to wit: 'We, the jury in the above entitled cause, do find the defendant Bert Ross guilty of murder of the first degree as charged in the indictment, and in our judgment he should be punished by the infliction of the death penalty.

"'P. O'LEARY, *Foreman*;'

"And whereas, upon said verdict the judgment aforesaid was upon proceedings duly had, pronounced by this court, which judgment has become and now is final, and is in full force and effect;

"And whereas the day heretofore fixed for the execution of said judgment has passed and said judgment has not been executed:

"It is ordered that you, Bert Ross, be taken hence by the sheriff of the county of San Luis Obispo, State of California, and be by him detained in close confinement in the county jail of said county, and within ten days from this date the said sheriff is ordered and directed to deliver you, Bert Ross, to the Warden of the State prison of the State of California at San Quentin, in the county of Marin, State of California,
13 and after such delivery to said warden that you, said Bert Ross, be kept and detained in said State prison at San Quentin by the warden thereof in close confinement until Friday, the tenth day of January, 1902, and on the said day, between the hours of sunrise and noon of said day, that the said judgment be carried into execution, and that you, Bert Ross, for the wilful, deliberate, and premeditated murder of Will J. Ward, of which you have been duly convicted, be by the said warden of the said State prison aforesaid, and within the walls of said State prison, hanged by the neck until you shall be dead. And may God have mercy on your soul.

"E. P. UNANGST, *Judge*.

Dated November 9, 1901."

That the judgment referred to in said commitment is a judgment which was, on the 23rd day of May, 1900, rendered in the said superior court, of which judgment the following is a copy:

"*Judgment.*

"In the superior court of the State of California, in and for the county of San Luis Obispo.

"Tuesday, May 15, 1900. Present: Hon. E. P. Unangst, judge; E. C. Ivins, sheriff; John Whicher, clerk.

"THE PEOPLE OF THE STATE OF CALIFORNIA)
vs.
"BERT ROSS.)

"This being the time fixed by the court for passing judgment, and district attorney, defendant and his counsel, Graves & Graves, being present in court, the court made the following statement: 'In this case you, Bert Ross, was indicted by the grand jury of the county of San Luis Obispo, State of California, by indictment duly found, returned, presented, and filed in this court on December 22d, 1899, by said grand jury, charging you, Bert Ross, with the crime of felony, to wit, murder, in that you did wilfully, unlawfully, feloniously, and with malice aforethought, kill and murder one Will J. Ward, a human being, as
14 alleged and set forth and charged in said indictment, and upon this indictment in this court, on January 27th, 1900, you then and there being present with your counsel, was duly arraigned, and in said court thereafter, on, to wit, February 5th, 1900, you then and there being present with your counsel, entered the plea of not guilty of the offense charged in said indictment; and on this plea trial was had, a jury impaneled, and on the 5th day of May, A. D. 1900, the jury in said cause returned into this court their verdict: 'We, the jury in the above-entitled cause, do find the defendant, Bert Ross, guilty of murder of the first degree, as charged in the indictment, and in our judgment he should be punished by the infliction of the death penalty. P. O'Leary, foreman.' And thereupon, in open court, an order was made fixing May 15th, 1900, at 1.30 p. m., as the time for pronouncing judgment on said verdict. Have you any legal cause to show why judgment should not be pronounced against you? On motion of defendant, through his counsel, passing of judgment is continued until May 19th, 1900, at 9.30.

"Wednesday, May 23, 1900. Court opened at 10 o'clock. Present, Hon. E. P. Unangst, judge; John Whicher, clerk; E. C. Ivins, sheriff. (Title of court and cause.)

"The district attorney, defendant, and his counsel being present in court, defendant makes a motion in arrest of judgment, which is argued, submitted, and denied. The defendant then moves for a new trial, on grounds stated in motion, and for time in which to secure and present affidavits as to newly discovered evidence; argued, submitted, and denied.

"No sufficient cause been alleged, or saown, or appearing to the court why judgment should not be pronounced, the court now renders its judg-

ment: 'That whereas you, Bert Ross, have been duly convicted in this court of the crime of murder of the first degree, upon the verdict duly found in said court, as follows, to wit: "We, the jury in the above-entitled cause, do find the defendant, Bert Ross, guilty of murder of the first degree, as charged in the indictment, and, in our
15 judgment, he should be punished by the infliction of the death penalty. P. O'Leary, foreman." It is therefore ordered, adjudged, and decreed, and the judgment of the law and the sentence of this court is now pronounced as follows: The judgment of the law and the sentence of the court is that you, Bert Ross, be taken hence by the sheriff of the county of San Luis Obispo, State of California, and be by him detained in close confinement in the county jail of said county, and within ten days from this date the said sheriff is ordered and directed to deliver you to the warden of the State prison of the State of California at San Quentin, in the county of Marin, State of California, and after such delivery to said warden, that you, Bert Ross, be kept and detained in said State prison at San Quentin, by the warden thereof, in close confinement, until such day as shall hereafter be designated and fixed in the warrant of execution to be issued herein; and on the day so designated and fixed in said warrant of execution, and between the hours therein named, that you, Bert Ross, for the wilful, deliberate, and premeditated murder of Will J. Ward, of which you have been duly convicted, be by the said warden of the said State prison aforesaid, and within the walls of said State prison, hanged by the neck until you shall be dead, and may God have mercy on your soul."

That the said judgment and the said order of the said court, so made on the 9th day of November, 1901, and the said commitment based thereon, are and each of them is wholly void and of no effect by reason of the following matters:

That by the constitution of the said State of California, no person can be convicted of a capital offense except upon the indictment of a grand jury, or upon an information after examination and commitment by a magistrate; and the law of said State authorizes prosecution for such offense only upon such indictment or information.

That by the law of said State a grand jury is required to be drawn by the superior court by selection, in the manner provided by law, from a list of names selected and certified to such court by the board of supervisors of the county. Nevertheless, the said court did not draw
16 or select any grand jury from any list of names so selected by the board of supervisors of said county; but, without authority of law, itself selected the names of certain persons not on any list selected or certified by said board of supervisors, and from the said list of names so selected by said court, and without authority of law, drew a grand jury, which proceedings of said court are set forth in the records of said court as follows:

(Title.)

"In the matter of grand jurors for the ensuing year of 1899.

"It is hereby ordered that the estimated number of grand jurors required for the transaction of the business of the said court during the

ensuing year of 1899 be and is hereby fixed and designated at thirty-five (35).

"Dated January 28, 1899.

"E. P. UNANGST, *Judge.*

(Endorsed:) "Filed Jan'y 28, 1899.

"JOHN WHICHER, *Clerk.*

"By WM. MALLAGH, *Deputy.*

(Title.)

"In the matter of the grand jurors for the ensuing year of 1899.

"In accordance with and in pursuance of the order heretofore this day made in the above-entitled matter, the following electors of San Luis Obispo County, California, having all the qualifications and being suitable and competent persons to serve as grand jurors, are hereby selected as the persons from whom shall be drawn grand jurors to serve in the superior court for the ensuing year of 1899: (Here follows a list showing the names of thirty-five persons, and their place of residence in said county.)

"Dated January 28th, 1899.

"E. P. UNANGST, *Judge.*

(Endorsed:) "List of names selected by Judge E. P. Unangst to serve for ensuing year 1899.

"Filed Jan'y 28, 1899.

17

"JOHN WHICHER, *Clerk.*

"By WM. MALLAGH, *Deputy.*

(Title.)

"By the Court: Whereas, the business of our superior court aforesaid requires the attendance of a grand jury, and no grand jury being in attendance upon said court, it is

"Ordered, that twenty-five grand jurors be drawn in the manner required by law and be summoned by the sheriff of said county, to be and appear before said court at the court room thereof on Monday, December the 11th, 1899, at ten o'clock a. m., to act as grand jurors.

"It is further ordered that said drawing take place at the hour of ten o'clock a. m., November the 22d, 1899.

"Done in open court this 21st day of November, 1899, at 3.15 o'clock p. m.

"E. P. UNANGST, *Judge.*

"Attest: JOHN WHICHER, *Clerk.*

[SEAL.]

(Endorsed:) "Order for grand jury. Filed Nov. 21, 1899. John Whicher, clerk. By Wm. Mallagh, deputy."

That from the twenty-five names so selected and drawn by said court the said court proceeded to empanel and did empanel an alleged grand jury, which body so empaneled found against the defendant the indict-

ment mentioned in said judgment; and the said defendant in said action was tried and convicted upon said indictment and not otherwise, and not upon any other indictment, nor upon any information whatsoever.

That by the law of the State of California an indictment found by a body of men not lawfully empaneled as a grand jury is void, and any judgment rendered thereupon is beyond the jurisdiction of the court and void. Furthermore, by the law of said State a defendant is entitled to challenge the panel of a grand jury for one or more of the follow-
18 ing causes only: That the requisite number of ballots was not drawn from the jury box of the county; that notice of the drawing of the grand jury was not given; or that the drawing was not had in the presence of the officers designated by law; and if convicted the defendant can not, upon appeal, present to the Supreme Court the question of whether such grand jury was otherwise legally selected, drawn, or empaneled, nor can a judgment of conviction be reversed on appeal on account of any objection to such panel, except such objections as may so be raised by challenge to such panel.

By reason of the matters aforesaid, the said judgment and conviction are wholly void, and do not constitute due process or any process of law by which the same can be enforced against the said Bert Ross; yet, nevertheless, the said warden continues to hold the said Bert Ross in custody by authority of the same, and will, if the said Bert Ross be not sooner discharged from his custody, take the life of said Bert Ross on the 10th day of January, 1902; and the said Bert Ross has no remedy by appeal nor in the ordinary course of law.

Wherefore your petitioner respectfully prays that your honorable court grant him a writ of habeas corpus, directed to the said Martin Aguirre, warden of said State prison, as aforesaid, requiring him to bring the body of the said Bert Ross before your honorable court, with the true cause of his detention, and that thereupon your honorable court do discharge the said Bert Ross from the custody aforesaid.

WILLIAM GRAVES,
Petitioner.

STATE OF CALIFORNIA,
City and County of San Francisco:

WILLIAM GRAVES, being duly sworn, deposes and says that he is the petitioner above named and that the facts set forth in the foregoing petition are true.

WILLIAM GRAVES.

Subscribed and sworn to before me this 2nd day of January, 1902.

GEO. W. ROOT,
Clerk,
By W. E. BRADY,
Deputy Clerk Supreme Court.

19 (Endorsed:) Filed Jan. 2, 1902. Geo. W. Root, clerk. By A. E. Hornlein, deputy. By the court. Writ denied Jan'y 2, 1902. Beatty, C. J. Filed Jan. 2, 1902. Geo. W. Root, clerk. By A. E. Hornlein, deputy.

20 S. F. No. ——. In the supreme court of the State of California.

In the matter of Bert Ross, on habeas corpus.

Petitioner's authorities.

The act of March 23, 1893 (Stats., 1893, 297), purporting to amend sections 204, 205, 206, and 208 of the Code of Civil Procedure, is unconstitutional in that the subject of the act is not stated in the title.

Lewis v. Dunne, 66 Pac., 478.

A grand jury not selected, drawn, or summoned according to law is an illegal body; and no court has any jurisdiction to try a defendant upon an indictment found by such a body, and a conviction upon such indictment is void.

Bruner v. Superior Court, 92 Cal., 239;
Ex parte Farley, 40 Fed., 66;
United States v. Dixon, 44 Fed., 401;
Ex parte Reynolds, 35 Tex. Cr., 437.

A "State" deprives one of liberty without due process of law when a court of that State, without jurisdiction under the law of the State, sentences him to imprisonment.

Ex parte Ulrich, 42 Fed., 587;
Ex parte Kelly, 46 Fed., 653;
Ex parte Glenn, 111 Fed., 257.

The question whether a grand jury was summoned from names illegally selected can not be raised upon appeal, for it is not made a ground of challenge to the panel or of arrest of judgment, and only
21 objections so allowed to be made can be raised on appeal.

Bruner v. Superior Court, 92 Cal., 239.

Habeas corpus is therefore the only remedy.

WM. GRAVES,
Petitioner.

W. C. VAN FLEET,
Of Counsel.

(Endorsed:) Filed Jan. 2, 1902. Geo. W. Root, clerk. By A. E. Hornlein, deputy.

22 S. F. No. ——. In the supreme court of the State of California.

In the matter of Bert Ross, on habeas corpus.

To the Honorable William H. Beatty, Chief Justice of the Supreme Court of the State of California:

Now comes William Graves, petitioner herein, and says that, on the 2nd day of January, 1901, this court entered judgment herein against this petitioner denying his application for a writ of habeas corpus on behalf of the said Bert Ross, in which judgment certain errors were committed to the prejudice of this petitioner and the said Bert Ross, all of which errors will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this petitioner prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of

the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

WM. GRAVES,
Petitioner.

W. C. VAN FLEET,
Of Counsel.

(Endorsed:) Filed Jan. 3, 1902. Geo. W. Root, clerk. By A. W. Johnson, deputy. Writ denied. W. H. Beatty, chief justice of the supreme court of California. January 3, 1902.

23 In the Supreme Court of the United States.

In the matter of the petition of William Graves and Bert Ross, appellants.

Assignment of errors.

Now comes William Graves, the petitioner herein, and the said Bert Ross by the said William Graves, his attorney, and say that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

1. That no indictment by any grand jury was ever found or returned against the said Bert Ross.

2. That the superior court of the county of San Luis Obispo had no jurisdiction to try the said Bert Ross upon the indictment mentioned in the record herein, because said indictment was not found by any grand jury selected according to law.

3. That the said superior court, having no jurisdiction to try the said Bert Ross upon said pretended indictment, its judgment of conviction is void and does not constitute due process of law by which the said Bert Ross can lawfully be deprived of his liberty or life.

4. That the supreme court of the State of California erred in refusing to grant a writ of habeas corpus for the body of the said Bert Ross.

Wherefore, the said William Graves, and the said Bert Ross, by his attorney, William Graves, pray that the order of the said supreme court of the State of California denying the writ of habeas corpus prayed for in this cause be reversed, and that the said court be ordered and directed to grant said writ.

_____ _____,
Petitioner.

(Endorsed:) Filed Jan. 3, 1902. Geo. W. Root, clerk, by A. W. Johnson, deputy.

24 I, George W. Root, clerk of the supreme court of the State of California, do hereby certify that the above and foregoing are full, true, and correct copies of the petition for writ of habeas corpus, petitioner's authorities, order denying writ of habeas corpus, petition to chief justice for writ of error, assignment of errors, and order of chief justice denying the writ of error, in the matter of Bert Ross on habeas corpus, and that the same constitute the whole of the record in said proceeding.

Witness my hand and the seal of said court this 4th day of January, 1902.

[Seal of supreme court, State of California.]

GEO. W. ROOT,
Clerk,
By A. W. JOHNSON,
Chief Deputy Clerk.

(Endorsed:) No. 13191. In U. S. circuit court. No. 874. Crim. supreme court of the State of California. In the matter of Bert Ross, on habeas corpus. Certified copy of record from supreme ct. Cal. Filed Jan. 6, 1902. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

25 *Order denying petition for writ, &c., allowing appeal to Supreme Court of United States, etc.*

At a stated term, to wit: the November term, A. D. 1901, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Monday, the 6th day of January, in the year of our Lord one thousand nine hundred and two.

Present: The Honorable William W. Morrow, circuit judge.

In the matter of Bert Ross on habeas corpus. No. 13191.

In this matter, W. C. Van Fleet and W. B. Treadwell, esqs., attorneys for Bert Ross, petitioner herein, appeared before the court, and said attorneys (having filed a certified copy of the record of certain proceedings had before the Supreme Court of the State of California on behalf of said Bert Ross) asked and were granted leave to renew, and did thereupon renew, their application for a writ of habeas corpus on behalf of said Bert Ross as prayed in his petition filed in this court upon January 2nd, 1902.

Thereupon said petition and certified copy of record, and the renewed application thereon, were submitted to the court, and the same having been fully considered, it was ordered that the writ of habeas corpus prayed in and by the petition of said Bert Ross herein be and hereby is denied, and that said petition be and hereby is dismissed.

Thereafter said attorneys for petitioner filed and presented to the court the petition of said Bert Ross for an order allowing an appeal to the Supreme Court of the United States from the foregoing order denying his application for a writ of habeas corpus, hereinsaid petition for appeal being accompanied by an assignment of errors to be urged by him upon his appeal.

And said petition for appeal having been fully considered, it was ordered that the same be granted, and that said Bert Ross be
26 and he hereby is allowed to prosecute an appeal to the Supreme Court of the United States from the foregoing order denying his application for a writ of habeas corpus herein; that the amount of the bond or undertaking for costs upon said appeal to be filed by said petitioner be and hereby is fixed at the sum of $500.00; that upon the filing

and approval of such bond or undertaking citation issue in form as prescribed by law, and that a certified transcript of the record and all proceedings herein be forthwith transmitted to the Supreme Court of the United States.

27 In the circuit court of the United States for the northern district of California.

In the matter of Bert Ross on habeas corpus. Petition for appeal.

The above petitioner, conceiving himself aggrieved by the order made and entered on the 6th day of January, 1902, in the above-entitled cause, denying the application of said petitioner for a writ of habeas corpus, does hereby appeal from said order to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herein; and he prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated January 6, 1902.

WILLIAM GRAVES,
Attorney for Petitioner.

The foregoing claim of appeal is allowed.
Dated January 6, 1902.

WM. W. MORROW,
Circuit Judge.

28 *Assignment of errors.*

In the circuit court of the United States for the northern district of California.

In the matter of Bert Ross on habeas corpus.

And now, on the 6th day of January, 1902, comes the said petitioner, by William Graves, his attorney, and says that the order in said cause, denying his application for a writ of habeas corpus, is erroneous and against the just rights of said petitioner for the following reasons:

1. Because it appears by his petition herein that he is entitled to a writ of habeas corpus from this court.

2. Because it appears by said petition that no indictment by any grand jury was ever found or returned against the said petitioner.

3. Because the superior court of the County of San Luis Obispo, State of California, had no jurisdiction to try the said petitioner upon the indictment mentioned in the record herein, for the reason that said indictment was not found by any grand jury selected according to law.

4. Because the judgment of said superior court convicting the said petitioner upon said pretended indictment is void, and did not constitute due process of law by which the said petitioner could lawfully be deprived of his liberty or life, for the reason that said superior court had no jurisdiction to try the said petitioner upon said pretended indictment.

5. Because, by the law of the State of California, the said petitioner had no remedy in that behalf by appeal.

6. Because the said petitioner did duly apply to the supreme court of the said State of California for a writ of habeas corpus, for the
29 reasons and on the grounds set forth in his petition herein, and the said supreme court of the State of California refused to issue said writ; whereupon said petitioner duly applied to the chief justice of said court to allow a writ of error to the Supreme Court of the United States from said order refusing to issue said writ of habeas corpus, but the said chief justice refused to allow said writ of error; and petitioner has no other remedy in the courts of said State.

Wherefore, the said petitioner prays that the said order be reversed, and that the said court may be directed to grant to him a writ of habeas corpus, as prayed for in his said petition.

WILLIAM GRAVES,
Attorney for Petitioner.

(Endorsed:) No. 13191. In the circuit court of the United States for the northern district of California. In the matter of Bert Ross, on habeas corpus. Petition for appeal and assignment of errors. Filed January 6, 1902. Southard Hoffman, clerk. By W. D. Beaizley, deputy clerk.

30 *Undertaking on appeal.*

In the circuit court of the United States for the northern district of California.

In the matter of Bert Ross, on habeas corpus.

BERT ROSS, APPELLANT,
vs.
MARTIN AGUIRRE, APPELLEE.

Whereas, lately, at a circuit court of the United States for the northern district of California, in an application of said Bert Ross for a writ of habeas corpus to be directed to one Martin Aguirre, an order was entered by said court against said Bert Ross, denying the said application and refusing to issue said writ, and the said Bert Ross having taken and obtained an appeal, and filed a copy thereof in the clerk's office of the said court, to reverse the aforesaid order, and a citation directed to the said Martin Aguirre citing and admonishing him to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington on the 27 day of January next.

Now, therefore, we, the undersigned, William Graves and W. C. Van Fleet, do hereby undertake and promise, on the part of the said Bert Ross, that the said Bert Ross shall prosecute said appeal to effect and answer all damages and costs, if he fail to make the said plea good, not exceeding the sum of five hundred dollars ($500.00), for the payment of

which amount we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, to the said Martin Aguirre.

31 Sealed with our seals, and dated this 6th day of January, 1902.

WILLIAM GRAVES. [SEAL.]
W. C. VAN FLEET. [SEAL.]

Approved:

WM. W. MORROW,
Circuit Judge.

(Endorsed:) No. 13191. In the circuit court of the United States for the northern district of California. In the matter of Bert Ross, on habeas corpus. Undertaking on appeal. Filed January 6, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

32 *Affidavit of poverty.*

In the circuit court of the United States for the northern district of California.

In the matter of Bert Ross, on habeas corpus.

STATE OF CALIFORNIA,
County of Marin, ss:

BERT ROSS, being duly sworn, deposes and says: That he is the petitioner in the above entitled proceeding; that the nature of said proceeding is to obtain a writ of habeas corpus directed to the warden of the State prison of the State of California at San Quentin, California, directing him to produce the body of said petitioner in said court, to be dealt with according to law, and to obtain a discharge of this petitioner from the custody of said warden; and the ground of said proceeding is that the said warden, acting as such, is depriving the said petitioner of his liberty without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

And deponent further deposes and says that because of his poverty he is unable to pay the costs or any costs of said proceeding, or to give any security for the same, and that he believes that he is entitled to the redress he seeks by said proceeding.

BERT ROSS.

Subscribed and sworn to before me this 11th day of January, 1902.

[SEAL.] F. W. REYNOLDS,
Notary Public in and for Marin County, Cal.

(Endorsed:) Filed January 13, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

33 At a stated term, to wit, the November term, A. D. 1901, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Monday, the 13th day of January, in the year of our Lord one thousand nine hundred and two.

Present: The Honorable William W. Morrow, circuit judge.

In the matter of Bert Ross, on habeas corpus. No. 13191.

Minute order that services be performed without costs to petitioner.

Upon motion of W. B. Treadwell, esq., one of the attorneys for petitioner, and on consideration of the affidavit of petitioner, this day filed in that behalf, it is

Ordered, that pursuant to the provisions of the act of Congress of July 20, 1892, the services heretofore performed, and the services to be performed by the clerk of this court, on behalf of petitioner, be without cost to said petitioner.

34 *Affidavit of service of citation.*

In the circuit court of the United States for the northern district of California.

In the matter of Bert Ross, on habeas corpus.

BERT ROSS, APPELLANT.
vs.
MARTIN AGUIRRE, APPELLEE.

UNITED STATES OF AMERICA,
Northern District of California, ss:

WILLIAM GRAVES, being duly sworn, deposes and says: That he is one of the attorneys for the petitioner and appellant in the above entitled proceeding. That, on the 7th day of January, 1902, he served upon Martin Aguirre, the warden of the State prison of the State of California, at San Quentin, California, the citation on appeal in said matter, by exhibiting to the said Martin Aguirre the said original citation, and then and there delivering to him a true copy thereof.

WILLIAM GRAVES.

Subscribed and sworn to before me this 14th day of January, 1902.
[SEAL.] M. EGAN,
Notary Public.

(Endorsed:) Filed January 15, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

35 In the circuit court of the United States, ninth judicial circuit, northern district of California.

In the matter of Bert Ross, on habeas corpus. No. 13191.

Certificate to record on appeal.

I, Southard Hoffman, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing pages, numbered from 1 to 34, inclusive, to be a full, true, and correct copy of the record and all

proceedings in the above entitled matter, and that the same together constitute the transcript of the record herein, upon appeal to the Supreme Court of the United States, and that the original citation is annexed hereto.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this day of January, A. D. 1902.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

36 In the Supreme Court of the United States.

The President of the United States of America to Martin Aguirre, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 27th day of January next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the northern district of California, wherein Bert Ross is appellent and you are appellee, to show cause, if any there be, why the order rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 6th day of January, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and twenty-sixth.

WM. W. MORROW,
Circuit Judge.

I hereby admit service of copy of the foregoing citation this seventh day of January, 1902.

M. G. AGUIRRE,
Warden California State Prison, at San Quentin.

(Indorsed:) No. 13191. In U. S. circuit court, N. D. Cal. In the Supreme Court of the United States. In the matter of Bert Ross, on habeas corpus. Citation on appeal. Filed January 7, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk. In U. S. circuit court, N. D. Cal.

37 (Indorsment on cover:) File No. 18,382, N. California C. C. U. S. Term No. 228, Bert Ross, appellant, vs. Martin Aguirre, warden of the State prison of the State of California, at San Quentin, California. Filed January 25, 1902.

O

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1902.

BERT ROSS, *Appellant,* vs. MARTIN AGUIRRE, WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA AT SAN QUENTIN, CALIFORNIA, *Appellee.*	No. 228.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from an order of the Circuit Court of the United States for the Northern District of California, denying the petition of Bert Ross for a writ of habeas corpus.

The appellant presented a petition, (*fols.* 1 to 9,) alleging that he was restrained of his liberty by the appellee, as Warden of the State Prison of California, under a judgment of a State Court rendered without due process of law and in

violation of the fourteenth amendment to the Constitution of the United States, and setting forth the facts relied on. The court denied the petition (*fol.* 10) on the ground that application for relief on behalf of petitioner should first be made to the courts of the State of California.

A petition for habeas corpus on behalf of the appellant, on the same grounds, (*fols.* 11 to 21) was thereupon presented to the Supreme Court of the State of California, which was (*fol.* 19) denied by that court without assigning any reason. An application (*fols.* 22 to 23) was thereupon made to the Chief Justice of that court for a writ of error to this Court, which (*fol.* 22) was likewise denied.

Thereupon (*fol.* 25) the appellant filed in said Circuit Court a certified copy of the record of said proceedings in the Supreme Court of California, and asked leave to renew his application for habeas corpus. Leave being so granted, the petition was again submitted and denied, (*fol.* 25,) and an appeal to this Court (*fols.* 25 to 27) was allowed. No reason was assigned by the court for the denial of the petition.

The facts alleged in the petition, and relied on by appellant for the issuance of the writ prayed for, are as follows:

Section 8 of Article I of the Constitution of the State of California, adopted May 7, 1879, is as follows:

> "Sec. 8. Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a

magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county."

On March 24, 1893, and for many years prior thereto, there was in force in the State of California, a statute known as the Code of Civil Procedure, which provided, in sections 204 to 211 inclusive, the manner of selecting and returning the names of persons to serve as trial jurors and grand jurors, in civil and criminal cases. Those sections are as follows:

"Sec. 204. In the month of January in each year, it shall be the duty of the superior court in each of the counties of this state to make an order designating the estimated number of grand jurors, and also the number of trial jurors, that will, in the opinion of said court, be required for the transaction of the business of the court, and the trial of causes therein, during the ensuing year; and immediately after said order shall be made, the board of supervisors shall select, as provided in the next section, a list of persons to serve as grand jurors, and also a list of persons to serve as trial jurors, in the superior court of said county, during the ensuing year, or until new lists of jurors shall be provided. In cities and counties having over one hundred thousand inhabitants, such selection shall be made by the judges of the superior court, or a majority of them if all do not attend."

"Sec. 205. They shall proceed to select and list the grand jurors required by said order of the superior

court, and then select and list the trial jurors required by said order. Said selections and listings shall be made of persons suitable and competent to serve as jurors, who are assessed on the last preceding assessment roll of such county, or city and county; and in making such selections they shall take the names of such only as are not exempt from serving, who are in possession of their natural faculties, and not infirm or decrepit, of fair character and approved integrity, and of sound judgment."

"Sec. 206. The list of jurors, to be made as provided in the preceding section, shall contain the number of persons which shall have been designated by the court in its order. The names for such lists shall be selected from the different wards or townships of the respective counties in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making said lists; and said lists shall be kept separate and distinct one from the other."

"Sec. 208. Certified lists of the persons so selected to serve as grand jurors and as trial jurors shall at once be placed in possession of the county clerk."

"Sec. 209. On receiving such lists the county clerk shall file the same in his office, and write down the names contained thereon on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon. He shall deposit the pieces of paper having on them the names of the persons selected to serve as grand jurors in a box to be called the 'grand jury box', and those having on them the names of the persons selected to serve as trial jurors in a box to be called the 'trial jury box'."

"Sec. 210. The persons whose names are so returned shall be known as regular jurors, and shall serve for one year and until other persons are selected and returned."

"Sec. 211. The names of persons drawn for grand jurors shall be drawn from the 'grand jury box', and the names of persons for trial jurors shall be drawn from the 'trial jury box'; and if, at the end of the year, there shall be the names of persons in either of the said jury boxes who may not have been drawn during the year to serve, and have not served as jurors, the names of such persons may be placed on the list of jurors drawn for the succeeding year."

Sections 241 and 242 of the same Code provided the method of drawing and impaneling a grand jury. That method consists substantially in the clerk, in the presence and by order of the court, drawing by lot, from the grand jury box provided in said section 211, the names of nineteen of the persons so selected to serve as grand jurors, which nineteen persons constitute the grand jury.

There was, at the same times and ever since, another statute, called the Penal Code,—sections 894 to 927 of which prescribe the powers and duties of a grand jury and the grounds of and procedure upon challenge to the panel or to an individual grand juror,—and by section 917 thereof an indictment is defined as "an accusation in writing, pre-" sented by the grand jury to a competent court, charging " a person with a public offense."

It is the law of the State of California, that the *method* prescribed by law for drawing and impaneling a grand jury

is *jurisdictional,* and must be strictly followed; and that a body, not so drawn and impaneled, is not a grand jury, an indictment found by it is *void,* no court has any *jurisdiction* to try a person on such an indictment, and all proceedings founded upon it are void.

Bruner v. *Superior Court,* 92 Cal. 239.

On March 23, 1893, the legislature of the State passed an Act, (*Stats. Cal.* 1893, p. 297,) entitled as follows: "An "Act to amend sections 204, 205, 206, and 208 of the Code "of Civil Procedure;" and no other Act attempting to amend either of the sections we have quoted has been passed.

It is the law of the State of California, that an Act with only such a title as the foregoing is unconstitutional and void under the Constitution of that state.

Lewis v. *Dunne,* 134 Cal. 291.

Those attempted amendments were therefore void and ineffectual; and the sections we have quoted remain the law of that state.

It is also the law of the State of California that there is no remedy by appeal, under the statutes of that state, for the illegal selection or drawing of a grand jury; the only remedies being prohibition or habeas corpus.

Bruner v. *Superior Court,* 92 Cal. 239.

On January 28, 1899, the Judge of the Superior Court of the County of San Luis Obispo, California, made an order for the drawing of a grand jury for that court for the

year 1899; and thereupon that court impaneled a body which it called a grand jury, drawn solely from names selected by the Judge himself, and not from any names or list of names selected by the Board of Supervisors of the county, as required by the sections we have quoted. (*Fols.* 5 to 7½, pages 4 to 5.) The body so drawn and impaneled returned an indictment against this appellant for the crime of murder, upon which indictment he was tried and convicted and sentenced to death; and he was not tried or convicted upon any other indictment, nor upon any information. (*Fols.* 3, 4, 7.)

Under that conviction and sentence, and a commitment issued thereon, and not under any other authority, the appellee, as such Warden, holds the appellant in custody, and, will, if the appellant be not sooner discharged from his custody, take his life.

In stating the foregoing facts, it has been necessary, for the sake of clearness, to state some matters of law. Those statements will be verified in the course of our argument.

On this case, we contend:

1. That "due process of law," upon which a person may be deprived of life or liberty, cannot be had without *some* proceedings under *some* law prescribed by the supreme authority in the state; that if the state has prescribed the law under which such deprivation may be had, any such deprivation had without the authority of that law, is "with-" out due process of law"; that if such unlawful deprivation

is accomplished by the judgment of a court of the state, otherwise competent, or by an officer of the state under color of the authority of the state, it is committed by the state itself.

2. That, if the sections we have quoted are the law of the state, the judgment of conviction and commitment under which appellant is held are void and of no effect, and do not constitute due process of law under which he may lawfully be restrained of his liberty.

3. That appellant has not been afforded any remedy by appeal, and habeas corpus is the proper remedy.

4. That the sections we have quoted constitute the sole law of the State of California under which a grand jury may be constituted.

ASSIGNMENTS OF ERROR.

(Transcript, *fols.* 28-29.)

And now, on the 6th day of January, 1902, comes the said petitioner, by William Graves, his attorney, and says that the order in said cause, denying his application for a writ of habeas corpus, is erroneous and against the just rights of said petitioner for the following reasons:

1. Because it appears by his petition herein that he is entitled to a writ of habeas corpus from this Court.

2. Because it appears by said petition that no indictment by any grand jury was ever found or returned against the said petitioner.

3. Because the superior court of the County of San Luis Obispo, State of California, had no jurisdiction to try the said petitioner upon the indictment mentioned in the record herein, for the reason that said indictment was not found by any grand jury selected according to law.

4. Because the judgment of said superior court convicting the said petitioner upon said pretended indictment is void, and did not constitute due process of law by which the said petitioner could lawfully be deprived of his liberty or life, for the reason that said superior court had no jurisdiction to try the said petitioner upon said pretended indictment.

5. Because, by the law of the State of California, the said petitioner had no remedy in that behalf by appeal.

6. Because the said petitioner did duly apply to the su-

preme court of the said State of California for a writ of habeas corpus, for the reasons and on the grounds set forth in his petition herein, and the said supreme court of the State of California refused to issue said writ; whereupon said petitioner duly applied to the chief justice of said court to allow a writ of error to the Supreme Court of the United States from said order refusing to issue said writ of habeas corpus, but the said chief justice refused to allow said writ of error; and petitioner has no other remedy in the courts of said state.

ARGUMENT.

I.

IF APPELLANT IS IN CUSTODY BY AUTHORITY OF A STATE, BUT WITHOUT THE AUTHORITY OF ANY *LAW* OF THE STATE, HE IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

Where a person, confined under color of process from a state court, applies to a Federal court to be released from that confinement, he must, of course, show that such confinement is in violation of the Constitution or laws of the United States. This, however, he sufficiently does when he shows that he is deprived by the state of his liberty without due process of law. The questions to be first determined in this case are, therefore, whether such proceedings as we complain of here constitute due process of law, and whether it is the state which is depriving the appellant of his liberty.

The questions which have been discussed under this constitutional provision, have usually been as to the validity of some statute of the state; but such inquiries do not exhaust the scope of the constitutional prohibition. The *statutes* of a state may be unexceptionable; but if the state, in disobedience to its own statutes, and without the authority of any law, deprives a person of his liberty, it cannot defend its unlawful acts by saying that it has enacted laws which, if obeyed, would have secured protection to him. The constitution, like the famous provision of Magna Charta, was

intended primarily as a safeguard against the exercise of arbitrary power. "Due process of law is process due ac- " cording to the law of the land, . . . regulated by the law " of the state"; and a trial, to be valid, must be had "accord- " ing to the settled course of judicial proceedings".

Walker v. *Sauvinet,* 92 U. S. 90.

It is, of course, true that, where the state has provided valid laws, but a court of that state, "acting within its juris- " diction", erroneously fails to follow that law, that error must be corrected, if at all, in the ordinary course of judicial proceedings; and it cannot be said that due process of law has not been had. But if that court has no authority, under any valid law of the state, to try the case at all, its judgment is simply void and does not constitute due process of law. If a person be deprived of liberty by such a judgment, he is so deprived *by the state,* whose court is exercising a power which can be exercised only by the state. It is therefore settled that a person deprived of his liberty by the judgment of a state court, *void* for any reason, may, under this constitutional provision, be discharged by a Federal court on habeas corpus.

Ex parte Nielson, 131 U. S. 176;
In re Mayfield, 141 U. S. 107, 116;
Ex parte Ulrich, 42 Fed. 587;
Ex parte Kelly, 46 Fed. 653;
Ex parte Glenn, 111 Fed. 257.

If, then, we can show that the judgment under which the appellant is detained, is, when tested by the law of the state,

coram non judice and void, he will be entitled to his discharge under this writ. This we shall endeavor to establish under the next head.

II.

THE JUDGMENT UNDER WHICH APPELLANT IS DETAINED IS VOID AND OF NO EFFECT UNDER THE LAW OF THE STATE OF CALIFORNIA, AND HE IS THEREFORE DEPRIVED OF HIS LIBERTY BY THE STATE WITHOUT DUE PROCESS OF LAW.

We have quoted at large, in our statement of the case, the sections of the California Code of Civil Procedure which provide the system for the selection of grand jurors and the impanelment of grand juries. That system is, in brief, that the persons to serve as grand jurors must be selected by the *Board of Supervisors* of the county, and that the Superior Court, when calling a grand jury, shall draw, by lot, nineteen names from the list of names so selected by that board, which nineteen persons shall constitute the grand jury.

We have also quoted the section of the Constitution of that state, which, as interpreted by the highest court of the state, provides that "no person can be held to answer for "crime, unless on information, after examination and com- "mitment by a magistrate, or an indictment by a grand "jury".

Bruner v. *Superior Court*, 92 Cal. 239, 249.

As the appellant here was never examined or committed by a magistrate, and no information was filed against him,

this case must rest on the indictment by the alleged "grand jury".

As we have shown, the Superior Court, instead of obeying this law, impaneled a grand jury drawn from a list of names selected *by the Judge himself,* and not by the Board of Supervisors; and appellant was tried, and the judgment in question was rendered, solely upon an indictment returned by the body so impaneled. (*Fols.* 6 to 7.) That body, not being composed of persons selected as required by law, was not a "grand jury", and had no jurisdiction to indict any one.

A grand jury impaneled without authority of law is an illegal body, and an indictment found by it is simply a nullity. No court has jurisdiction to try a person on such an indictment, and a judgment rendered thereon is void in the extreme sense.

Ex parte Farley, 40 Fed. 66;
U. S. v. *Dixon,* 44 Fed. 401;
Ex parte Reynolds, 35 Tex. Cr. 437.

Such is, in particular, the law of the State of California.

Bruner v. *Superior Court,* 92 Cal. 239.

In that case, the Supreme Court of California held that the Superior Court had no authority of law to impanel a grand jury in part from persons summoned by an elisor (the sheriff not being disqualified); that an indictment found by that grand jury was a *nullity;* that the Superior Court had no *jurisdiction* to try anyone on that indictment; and that any judgment it might render would be *void.* Ac-

cordingly, a writ of prohibition was granted restraining the Superior Court from trying the person so indicted. In the opinion of that court in that case, the whole subject is fully discussed, and we need add nothing to what was there said.

Tested by the rule laid down in those decisions, the judgment under which the appellant is detained is absolutely void, and does not constitute due or any process of law under which he can be restrained of his liberty,—least of all under which he can be put to death.

III.

UNDER THE LAW OF THE STATE OF CALIFORNIA, APPELLANT HAS NO REMEDY BY APPEAL; AND HABEAS CORPUS IS THEREFORE A PROPER REMEDY.

The judgment under which appellant is held being, as we have shown, void for want of jurisdiction, there would seem no doubt of the power of the courts of the United States to release him on habeas corpus. Nevertheless, as this Court has said that application for relief in such cases ought first to be made to the courts of the state, we shall proceed to show that appellant did duly apply to the highest court of the State of California for the only relief furnished him by the laws of that state.

Under the law of California, the objection here made to the authority of the grand jury, is not one which can be raised upon appeal, nor can a judgment of conviction be reviewed on appeal on that ground.

Bruner v. *Superior Court*, 92 Cal. 239, 252, and cases there cited.

The appellant here could therefore obtain no remedy by appeal in the courts of that state; and he was compelled to resort to habeas corpus. He duly applied to the Supreme Court of the State for that writ, but that court refused to issue it upon that application. No reason was given for that refusal, and we are left to conjecture the ground on which that court failed to afford a remedy sanctioned by the law of that state and the solemn decisions of the court itself. We were also denied a writ of error to this court; and, by reason of the early date set for the execution of appellant, we had no opportunity to apply to a justice of this Court for that writ. We therefore, having done all we could to obtain relief from the courts of the state, are now entitled to have that relief from the courts of the United States.

IV.

THE LAW OF CALIFORNIA, AS TO THE SELECTION OF GRAND JURIES, IS AS SET FORTH IN THIS BRIEF.

In the preceding portions of this argument, we have assumed that sections 204 to 211, inclusive, of the Code of Civil Procedure of California, as quoted in our statement of the case, constitute the law of that state as to the selection and impanelment of grand juries; and, if that assumption be correct, we think that the conclusions we have drawn necessarily follow. But, as an attempt was made by the legislature to amend certain of those sections, it remains to show that that attempt was ineffectual, and that those sec-

tions remain unamended. Such *is* the condition of the state law, because the amendatory act was void under the Constitution of the state.

Section 24 of Article IV of the Constitution of California provides, among other things, that "Every act shall embrace "but one subject, which subject shall be expressed in its "title"; and section 22 of Article I declares that "The "provisions of this constitution are mandatory and prohib- "itory, unless by express words they are declared to be "otherwise." Under these provisions, it is uniformly held by the Supreme Court of that state that an Act, the subject of which is not expressed in its title, is unconstitutional and void.

As we have said, the title of the act in question (*Stats. Cal.* 1893, p. 297) is as follows: "An act to amend sections "204, 205, 206, and 208 of the Code of Civil Procedure."

It was held in *People* v. *Parvin,* 74 Cal. 549, that an Act with such a title, but purporting to amend *only one section* of that Code, was valid. That decision was rendered by a bare majority of a divided court. But, in the recent case of *Lewis* v. *Dunne,* 134 Cal. 291, the former case was, if not expressly overruled, at least limited, and held not to be authority for upholding such a title when not confined *to a single section.* In the latter case, it was held that a reference, in the title of an amendatory Act, to the "Code of "Civil Procedure," without any further expression of the subject, was insufficient, and that, (unless, perhaps, in the case of an Act amending *only one section,*) an Act with a title such as the one here in question, is unconstitutional and

void. The opinion in that case is long; but a few extracts will make its meaning plain. The court, after holding the Act there in question to be void for another reason, said:

"But if the invalidity of the act for the reason above given could by any recondite, indirect, and abstruse reasoning be explained away, it is just as clear that the act is void for want of compliance with the other constitutional provisions, that 'every act shall have but one subject, which subject shall be expressed in its title.' It is apparent that the language of the title of the act in question, in and of itself, expresses no subject whatever. No one could tell from the title alone what subject of legislation was dealt with in the body of the act; such subject, so far as the title of the act informs us, might have been entirely different from anything to be found in the act itself. This, of course, would be admitted, except for the claim that although the title does not, as an independent instrument, express any subject, yet it does so by 'reference'.

"It may be conceded that where the title of an act clearly expresses a definite subject, then the title of an act amendatory thereof may be helped out by reference to the title of the original act,—the title of the original act, which does express a subject, being incorporated into and published as part of the title of the amendatory act. But, in the case at bar, how does the reference in the title help its failure to otherwise express the subject? The reference is, really, not to the title of any former act; it is merely to 'the Code of Civil Procedure of the state of California'. Now, what is the Code of Civil Procedure? It is merely a name given to a large part of the general laws of the state. The part of the great body of our laws which is to be found under that name

is not confined to any particular subject or subjects, but includes substantive law, criminal law, and legislation, that might be properly classed under any category whatever,—as well as 'civil procedure'. Nearly all of our general laws are arranged, for convenience, under four main headings, or names,—to wit, the Civil Code, the Code of Civil Procedure, the Penal Code, and the Political Code,—but no one of these codes is complete in itself; legislation under either code is inseparably interwoven with legislation under the others; and legislation upon any imaginable subject would not be held invalid because found in any particular code. . . .

"The decisions in California on this subject are not directly determinative of the question presented in the case at bar. The sufficiency of such a title as is here involved has never been presented to this court. *People* v. *Parvin,* 74 Cal. 549, is the only case here that can be at all insisted upon as supporting the respondent's contention. The title under consideration there was this: 'An act to amend section 3481 of the Political Code'. It referred to *one single section,* and named it. The almost universal custom of the legislature, in the numerous amendments which it has made to the codes, has been to put into the title of the amendatory act, after the number of the section, additional words expressing the subject of the act,—as, for instance, 'relating to the writ of prohibition', 'relating to the lien of mechanics and others', etc. In a very few instances —not more than two or three having been called to our attention—the additional explanatory words have been omitted, and one of these was involved in *People* v. *Parvin,* 74 Cal. 549. A bare majority of the court—two justices dissenting and one not participating—held

that the title was sufficient; but if we accept the decision as sound, it goes no further than to hold that the title of an act amending a *single* section of a code is sufficient, if it directly refers to the section and designates it by its number. . . .

"Our conclusion is, that, for the reasons above stated, the said act of March 8, 1901, is unconstitutional, and void for all purposes, and is inoperative to change or in any way affect the law of the state as it stood immediately before the approval of said act."

Under the rule laid down in that case, the amendatory Act here in question is unconstitutional and void; and the sections in question remain as quoted in our statement, notwithstanding those attempted amendments. The judgment of conviction of appellant was therefore, as we have shown, void.

It is provided, in section 755 of the Revised Statutes, that the court to which application is made for a writ of habeas corpus, *shall* forthwith award such writ, "unless it appears "from the petition itself that the party is not entitled "thereto." As the court below did not suggest any defect in the petition in this case, nor assign any reasons for not issuing the writ, we can only say that, if the argument in this brief is correct, that petition is sufficient and the writ should have been granted.

We therefore respectfully submit that the order appealed from should be reversed.

W. C. VAN FLEET and
W. B. TREADWELL,
For Appellant.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1902.

BERT ROSS, *Appellant*,

vs.

MARTIN AGUIRRE, Warden of the State Prison of the State of California, at San Quentin, California, *Appellee*.

No. 228.

APPELLANT'S BRIEF IN REPLY.

In the brief filed by the Attorney General of the State of California on behalf of the appellee, no answer is made to Points I, II, and III of appellant's brief, nor is it suggested that any of them admits of any answer. We may therefore assume that the correctness of those points is not disputed.

But counsel for appellee take issue with us as to the constitutionality of the Act of the legislature of California of March 23, 1893, (*Stats. Cal.* 1893, p. 297,) entitled "An Act

"to amend sections 204, 205, 206, and 208 of the Code of "Civil Procedure". We showed, at pages 16 to 20 of our brief, that the Supreme Court of California, in the case of *Lewis* v. *Dunne,* 134 Cal. 291, had held that an act with such a title is void under the constitution of the state; and that that court, in that case, if it did not expressly overrule the prior case of *People* v. *Parvin,* 74 Cal. 549, had at least limited its application to acts amending *a single section* of one of the codes. Counsel for appellee contend that the decision in *People* v. *Parvin* was not there so limited, but remains of full authority, and supports the constitutionality of the act here in question.

The reason assigned by counsel for their contention may be reduced to the proposition that the act considered in *Lewis* v. *Dunne* was there held void on other grounds than that stated by us, which grounds were sufficient to support the judgment in that case. But a decision of an appellate court cannot be thus construed. Where several independent reasons are assigned by the court for its decision, neither one of them can be considered as mere *dictum,* though either one alone would have been sufficient. Each point arising in the case, and actually passed on, is a decision by the court of a point of law, and of authority as a precedent, although the case could have been rested on one of several such points.

Camron v. *Kenfield,* 57 Cal. 550;
Gwinn v. *Hamilton,* 75 Cal. 265;
Porter v. *Muller,* 112 Cal. 355, 366.

While, then, it is true that, in *Lewis* v. *Dunne,* the court laid some stress on the fact that, in the title of the act there

in question, none of the code sections attempted to be amended were mentioned by number, that proposition, if a ground of decision at all, (which we doubt,) was only *one* of the grounds upon which the court based its conclusion. The court *did* assign, as one of those grounds, if not the principal ground, that a mere reference in the title of an amendatory act, to "the Code of Civil Procedure" does not state any subject whatever; and the court further *did* expressly decide, that, if there be any exception to that rule, it must be confined to an act amending only one single section of that code.

A brief reference to the course of decision in California on this subject, will make the meaning of that opinion clear.

The former constitution of the state contained a somewhat similar requirement as to the titles of acts; but the court held that that provision was merely directory, and was one to be enforced by the legislature only and not by the courts.

Pierpont v. *Crouch,* 10 Cal. 315.

To remedy that defect, the stringent provisions quoted on page 17 of our opening brief, were inserted in the present constitution; and it has since been uniformly held that an act, the title of which does not *"express"* its subject, is void.

Fatjo v. *Pfister,* 117 Cal. 83, 86;
Los Angeles v. *Hance,* 122 Cal. 77;
In re Werner, 129 Cal. 567, 570-572;
People v. *Curry,* 130 Cal. 82, 90-91;
Pratt v. *Browne,* 135 Cal. 649, 653.

Accordingly, in deciding *Lewis* v. *Dunne,* the court, taking its stand on that rule, considered but one question,

namely, whether or not the *subject* of the act there in controversy was sufficiently *expressed* in its title. In discussing that question, the court used the language quoted by us at pages 18 to 20 of our opening brief; which does completely decide the question in the present case. The court said that "'the Code of Civil Procedure of the State of California' " is merely a name given to a large part of the general laws " of the state", which laws are "not confined to any particu- " lar subject or subjects"; and that, therefore, "no one could " tell *from the title alone* what subject of legislation was " dealt with in the body of the act". In answer to that objection, the respondent in that case contended that the prior case of *People* v. *Parvin* had sustained the sufficiency of such titles. That contention was disposed of by the court by the language quoted by us on pages 19 and 20. That language, we submit, clearly amounts to a disapproval of that case;—and certainly that case is wholly inconsistent with the other language we have quoted. But, whether the court did or did not say that it disapproved of that case *in toto,* it certainly *did* hold, explicitly and decisively, that that case was not an authority as to such a title if the amendatory act purports to amend more than one section. That is unquestionably what the court held; and whether it did or did not correctly construe its prior opinion, the construction which it did put upon it is all that saved it from being expressly overruled.

We submit, therefore, that under the rule declared in *Lewis* v. *Dunne,* the title of the act here in question is fatally insufficient, and that *People* v. *Parvin* is not considered by the Supreme Court of this state as an authority to the con-

trary. As the only question is, What is the law of California? and as the latest decision of its highest court furnishes the only guide for this Court on the question, that decision should be followed here, whatever might be thought as to its correctness.

If there be a case to which the rule there declared applies in its fullest force, it is the one at bar. The *body* of the act here relied on by counsel for the appellee, undertakes to prescribe a method for the selection and impanelment of grand juries in *criminal* cases; yet, by its *title,* it purports merely to amend sections 204, 205, 206, and 208 of the Code of *Civil* Procedure. Surely, no one, *from that title alone,* could tell that the act in fact dealt with a matter of *criminal* legislation,—especially as the state has a code, called the "Penal Code", concerned with such matters. But for the reference, in that title, to the "Code of Civil Procedure", no one would for a moment contend that *any* subject was therein expressed; and, as it was clearly and unequivocally decided in *Lewis* v. *Dunne* that those words express no subject whatever, there can be no doubt that this title is fully within the rule there laid down.

Respectfully submitted,

W. C. VAN FLEET AND
W. B. TREADWELL,
For Appellant.

FILE COPY.

IN THE

SUPREME COURT OF THE UNITED STATES.

(October Term, 1902)

No. 228.

Supreme Court U. S.
FILED
APR 16 1903
JAMES H. McKENNEY,
Clerk.

BERT ROSS,
Appellant,

AGAINST

MARTIN AGUIRRE,
Appellee.

BRIEF FOR APPELLEE.

U. S. WEBB,
Attorney-General of the State of California,
E. B. POWER, and
C. N. POST,
Attorneys for Appellee.

Filed ....., 1903.

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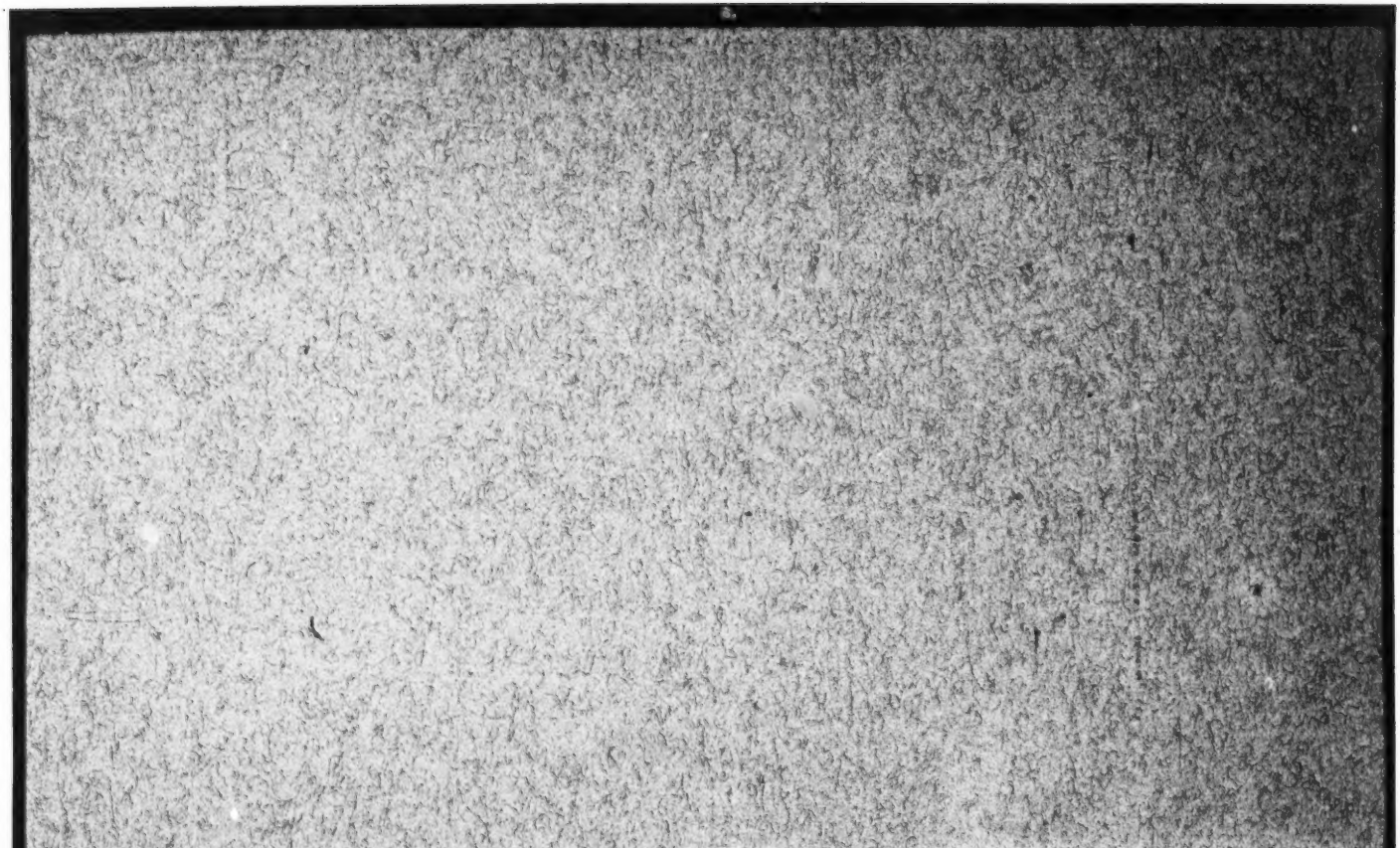


IN THE SUPREME COURT OF THE UNITED STATES.

(October Term, 1902.)

BERT ROSS,
Appellant,
against
MARTIN AGUIRRE, WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA AT SAN QUENTIN, CALIFORNIA,
Appellee.

No. 228.

BRIEF FOR APPELLEE.

It will be seen at a glance that if the amendment of 1893 to Sections 204, 205, 206, and 208 of the Code of Civil Procedure was constitutional, this appeal must fail, as its entire structure is built upon the assumption that said amendment was unconstitutional, as violative of Section 24 of Article IV of the Constitution of the State of California. The title of the Act by which the amendment was effected is as follows: "An Act to amend sections two hundred and four, two hundred and five, two hundred and six, and two hundred and eight of the Code of Civil Procedure."

The case of *Lewis* vs. *Dunne*, 134 Cal. 291, which is the only authority cited by counsel for appellant in support of their contention as to the unconstitu-

tionality of the amendment, is a case in which the Legislature of the State of California attempted the wholesale *revision* of the Code of Civil Procedure of said State, and entitled the Act by which said amendment was attempted, as follows: "An Act to revise the Code of Civil Procedure of the State of California, by amending certain sections, repealing others, and adding certain new sections."

In passing on this title, the Supreme Court of said State said:

> "It (referring to the title) *does not even refer to a single section* which is to be amended or repealed; and as to the 'new sections' it does not give the slightest intimation as to what they are to contain, or what subject they are to deal with."

(The italicized words are ours.)

In that case the Supreme Court of California held the Act was unconstitutional, because (as one of two reasons) the title of the Act did not embrace but one subject expressed in its title, and the Chief Justice dissented from the majority opinion as to this ground of objection.

In *People* vs. *Parvin*, reported in 74 Cal. 549, the Supreme Court of the State of California held that the title of an Act amending Section 3481 of the Political Code in the following words: "An Act to amend Section 3481 of the Political Code," expressed the subject of the Act in its title sufficiently to meet the requirements of said Section 24 of Article IV of the Constitution of the State of California. In said case the Court said:

> "1. The Political Code constitutes a single statute, thus entitled: 'Title of the Act:

1. This Act shall be known as the Political Code of the State of California.' Whether, under the present Constitution, the Legislature would have power to enact a law so generally entitled, is a very serious question. But under the Constitution existing when the code was adopted, the title was sufficient, and the code continues in force. The section of the Constitution, after providing as above quoted, proceeds: 'No law shall be revised or amended by reference to its "title" (that is, by reference to its title alone); but in such case the Act revised or section amended shall be re-enacted, and published at length as revised or amended.' There is no question here but that Section 3481 was 're-enacted and published at length'; and the title of the Act amended is very clearly referred to as the 'Political Code.' With reference to a statute passed since the Constitution of 1879 took effect, there can be no doubt that a section of such a statute—the statute itself being properly entitled—may be amended by referring, in the title of the amendment, to the title of the statute amended, and re-enacting the section as amended. If, in such case, the title of the original statute did not state its 'subject,' both the statute and any amendment of it would be void. But it is enough if the title of the statute is recited; it is not necessary that the subject of the particular section amended shall be stated in the title of the amendatory Act. It is to be understood, of course, that if any subject shall be embraced in a section of an Act passed under the present Constitution, which shall not be expressed in the title of the Act, the section is void. (Art. 4, Sec. 4.) It follows, also, that, under pretense of amending a particular section, the Legislature can not legislate upon a subject not embraced in the title of the original Act. If it be said that the title of the amendatory Act of April 15, 1880, does not express the subject, the reply is that the Constitution does not require, in case of an amend-

ment, that the subject shall be any more fully stated than it is stated in the valid statute amended.

"Each article of the Political Code is preceded by headnotes numbered to correspond with the sections following, and purporting to give, in brief form, the subject of each such sections. It would sometimes give fuller notice to the members of the Legislature if the title to a bill for amending a section of the code embraced a statement of the matter contained in the appropriate headnote, or its equivalent. The headnote to Section 3481, however, is 'unreclaimed lands may be set off in a separate district,' and even this does not indicate that such district may be formed within another already existing. But the Constitution only requires that the title of the Act which it is proposed to amend shall be clearly mentioned or recited in the Act amending a particular section. This being done, the sufficiency of the title of the amendatory Act depends upon the sufficiency of the title of the original Act; and as the title of the Political Code was sufficient under the former Constitution, we are not prepared to say that the Political Code is a void Act because its title does not conform to the mandate of the Constitution, adopted after the code became an operative law."

The case of *People* vs. *Parvin* was quoted with approval in *People* vs. *Dobbins*, 73 Cal. 260, and *Francais* vs. *Somps*, 92 Cal. 505.

We can not agree with counsel for appellant in their conclusion that the case of *Lewis* vs. *Dunn* supra, limited the decision in the case of *People* vs. *Parvin* to be authority only where such title is confined to a single section of the code. It is true the Court stated in the decision in the former case that the decision in the latter case simply referred to a

case where a single section was amended, but the Court did not intimate in its decision that several sections might not be amended with a title such as we now have under consideration.

If counsel for appellant had quoted the clause which follows the quotation they have made use of in *Lewis* vs. *Dunne* (see page 20 of appellant's brief), it would have shown that the Court in that case intimated that one of the reasons the title was insufficient there was that the title did not refer to the sections of the code to be amended. The clause we refer to is as follows:

"It (*People* vs. *Parvin*) is not an authority for the sufficiency of such a title as is here involved, *which refers to no section whatever*, and it can not be considered as determinative of the question involved here, which was not before the Court in the facts in that case." (*Lewis* vs. *Dunne*, 134 Cal. 299.)

It is therefore clear that the Legislature of the State of California, under the authority of *People* vs. *Parvin*, which stands as the law of California to-day, could amend a single section of the codes of said State under such a title as we have under consideration. Then why could they not amend four sections of a code under a similar title, when the sections all refer to the same matter, as they do in this case, viz., the listing and selecting of jurors, and such sections are "re-enacted and published at length," as was done here?

If each section could be amended separately, under such a title, to hold that the four sections are not subject to such an amendment as a whole under one

title, would simply be to make a distinction without a difference.

The language quoted in the case of *People* vs. *Mullender*, 132 Cal., at page 220, is appropriate here, because the same constitutional provision is under consideration:

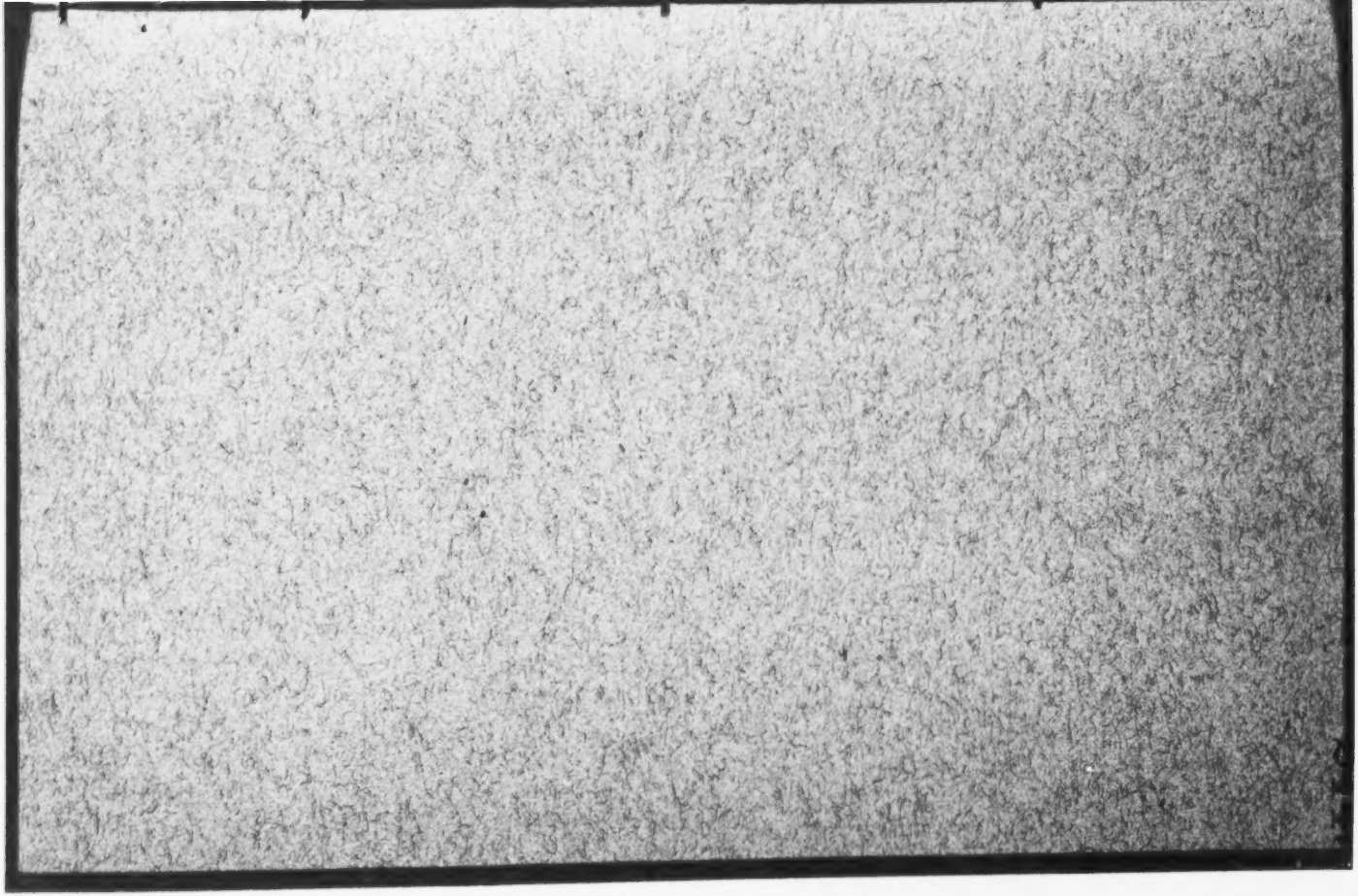
> "It is admitted that the constitutional provision under consideration has always been given a liberal construction; and this must be so, because the Constitution itself does not define the degree of particularity with which a title shall specify the subject of a bill. The matter must therefore be left largely to legislative discretion."

The case of *Marston* vs. *Humes*, and the cases there quoted, reported in 28 Pacific Reporter, page 520, passes on a question similar to the one under discussion here and is in point.

Appellee, therefore, respectfully submits that the amendments to the sections in question to be found in the Statutes of California 1893, at page 297 thereof, are constitutional, and as there is no question but what the grand jury was drawn in accordance with the provisions of said code sections as amended, the appeal in this case is without merit.

A. Ross.
Attorney General
E. B. Power and
L. N. Post.

Attorneys for Appellee.



RECEIPT of a copy of the within Brief is hereby admitted, this April 30th, 1903.

W. Van Fleet &
W. B. Treadwell

Attorneys for Appellant.

FILE COPY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 19.

Office Supreme Court U. S.
FILED
OCT 17 1903
JAMES H. McKENNEY,
Clerk.

BERT ROSS, APPELLANT,

vs.

MARTIN AGUIRRE, WARDEN, &c.

OPINION IN BEACH v. VON DETTEN, SUBMITTED BY APPELLEE.

M. N. BEACH, Constable, etc., Plaintiff and Appellant,
v.
OTTO VON DETTEN, County Auditor of San Joaquin County, Defendant and Respondent.

Sac., No. 1173. In Bank. June 26, 1903.

Constitutional law—Title of act—Amendments.—Title of act of March 23, 1901, amending county government act of 1897, held sufficient. The title of an amendatory act which gives the title of the original act in full and the number of the section in its amended form is sufficient. Any number of sections in the amendatory act can be thus amended by publishing the sections in full as amended. The amendment of one section is not a revision in the constitutional sense, nor of 58 sections out of 234. When the title of the amendatory act refers to the original, and the general plan of the original act is not changed with the same numbers it is an amendment and not revision. Presumption is in favor of constitutionality, and to that end will receive liberal construction. Title need not express all details nor be an index. When the matter in the amendatory act might have been included in the original it is good.

Appeal from the superior court of San Joaquin county—W. B. Nutter, judge.

For appellant—Ashley & Neumiller.
For respondent—A. H. Carpenter, as *amicus curiæ*.

This is an appeal by plaintiff from a judgment denying his application for a writ of mandate against defendant as county auditor. Plaintiff is a constable of Stockton township, in said county. He demanded a warrant for his salary as constable, amounting to $85.50, under the county government act of 1897. Defendant contends that he is only entitled to a warrant for $64.11, being his salary under the county government act of 1901 as amended.

The question to be determined is as to the constitutionality of the act of 1901 in so far as it affects the question of plaintiff's salary. The act of 1897 was entitled "An act to establish a uniform system of county and township governments," approved April 1, 1897. Section 56 of the act of 1897 provided: "The officers of a township are two justices of the peace, two constables, and such subordinate officers as are provided by law. In townships containing cities in which city justices or recorders are elected, there shall be but one justice of the peace." The act of 1897 fixed San Joaquin county as a county of the seventh class, and under its provisions plaintiff's salary was $100 per month. By an act entitled "An act to amend an act entitled 'An act to establish a uniform system of county and township governments, approved April 1, 1897,' by amending certain sections thereof, repealing certain other sections, and adding certain sections thereto," approved March 23, 1901, the legislature placed San Joaquin county in the eighth class, and made plaintiff's salary $75 per month. Under the above title the language used in amending the section of the act of 1897, fixing the classification of counties, is as follows: "Section one hundred and fifty-seven of an act entitled 'An act to establish a uniform system of county and township governments, approved April 1, 1897,' is hereby amended to read as follows:" All the sections so amended by the act of 1901 begin with a similar reference to the section and title of the act of 1897. Plaintiff contends that the act of 1901 is void because it violates that part of section 24 of article IV of the constitution of the State, which provides: "Every act shall embrace but one subject, which shall be expressed in its title * * * No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended * * *" The question, therefore, is as to whether or not the subject of the act of 1901 is expressed in its title, and whether it was published at length as amended. It is also claimed that the act is a revision and not an amendment. "We think it clearly appears that the act was an amendatory act, and not a revision. It is styled in the title, 'An act to amend;' and not only this, but every section amended is referred to in the body of the act by number, and 'is hereby amended to read as follows.' The legislature in every section amended refers to the title of the act of 1897, quoting it in full, and giving the number of the section amended, and the language in its amended form. It is therefore clear that the legislature thought it was amending certain sections of the act of 1897. Nor does it make any difference that fifty-eight sections of the original act of two hundred and thirty-four sections were thus amended.

If one section could be amended in the way in which it was done in this case, fifty-eight could be so amended." There is no law that makes the amendment of one section of an act embracing 234 sections a "revision." If the amendment of one section is not a revision, neither is the amendment of two sections, nor of fifty-eight sections. Of course, every amendment of any section is in one sense a revision of that section, but it is not a revision in the sense of the constitution. The remaining one hundred and seventy-six sections of the act of 1897 were not changed in any way, nor was the general plan of the original act changed, nor the matter re-arranged. In "The Borrowdale," 39 Fed. Rep. 380, it is said: "As long as there is one section of the original act untouched there is no revision, and it is sufficient to set forth and publish in the amendatory act only the sections actually amended and as amended." The above statement is evidently too broad, because it is apparent that an act consisting of many sections might be changed in many respects, the subjects treated of differently, the sections differently arranged and differently numbered, and yet retain one or more complete sections of the original act. In such case the act would be a revision. But in this case, where the title refers plainly to the original act, and the general plan of the original act is not changed, but three-fourths of the original sections remain the same, with the same numbers, it is evident that the amendatory act was not intended to be nor was it a revision, within the meaning of the constitution. In determining the constitutionality of an act of the legislature, courts always presume in the first place that the act is constitutional. They also presume that the legislature acted with integrity, and with an honest purpose to keep within the restrictions and limitations laid down by the constitution. The legislature is a co-ordinate department of the government, invested with high and responsible duties, and it must be presumed that it has considered and discussed the constitutionality of all measures passed by it. There has been a general disposition in all courts to construe constitutional provisions, with reference to the subject and title of an act, liberally, rather than to embarrass legislation by a construction which is unnecessary to the accomplishment of the beneficial purposes for which the provision was adopted. It is evident that the title of an act is not required to express fully all the details with which the act may deal, nor is it required to be an index to every topic under the act. It is said by Judge Cooley in his work on Constitutional Limitations, sixth edition, page 172: "The general purpose of these provisions is accomplished when a law has but one general subject, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible." And this court has adopted the liberal rule as above stated. *People v. Parvin et al.* was first decided in August, 1887, and affirmed in bank on re-hearing in January, 1888, 74 Cal. 549. It was there held that an act entitled "An

act to amend section 3481 of the Political Code" expresses the subject of the act in its title sufficiently to meet the requirements of the constitution. The court said: "There can be no doubt that a section of such a statute—the statute itself being properly entitled—may be amended by referring, in the title of the amendment, to the title of the statute amended, and re-enacting the statute as amended." That case was followed and approved in *People v. Dobbins*, 73 Cal. 257, decided also in August, 1887, where it was held that: "An act to amend an act entitled 'An act to establish a penal code,' approved February 14, 1872, by amending section 634, relating to fish and game," sufficiently expressed the subject in its title, within the meaning of the constitution. The Parvin case was also followed and approved in *Francais v. Somps*, 92 Cal. 502, where it was held that an amendatory act simply amending an act entitled "An act for the better protection of the stockholders in corporations formed under the laws of the State of California for the purpose of carrying on the business of mining," sufficiently expressed the subject in its title. The act so amended consisted of four sections, and the amendatory act did not mention the section or sections amended. In speaking of the constitutional provision here invoked, this court said in *Ex parte Liddell*, 93 Cal. 638: "It is admitted that the constitutional provision under consideration has always been given a liberal construction, and this must be so because the Constitution itself does not define the degree of particularity with which a title shall specify the subject of a bill. The matter must therefore be left largely to legislative discretion." The language quoted was adopted and approved in the late case of *People v. Mullander*, 132 Cal. 220. The rule as above stated is the rule laid down in the text books. It is said in Sutherland on Statutory Construction, section 101: "The constitutional requirement under discussion as applied to acts of this character, when they contain matter which might appropriately have been incorporated in the original act under its title, is satisfied generally if the amendatory or supplemental act identifies the original act by its title and declares the purpose to amend or supplement it." For a list of authorities in other States supporting the text above stated, see note 2 to above section, pages 116–117.

The main case relied upon by appellant is *Lewis v. Dunne*, 134 Cal. 291. That case is not in conflict with the views herein expressed. The act there held unconstitutional was held to be an attempt at a revision of the Code of Civil Procedure. It was not an act to amend an act properly entitled. The court said in that case: "That the title should, on its face, give at least some sort of information as to what the proposed act was about. This the title in question does not do." *People v. Parvin, supra*, was discussed and distinguished, but not overruled. It is argued that the act of 1901 contained certain new provisions, not contained in the act of 1897, relating to reporters of the superior court and jurors in criminal cases. The provisions referred to are not before us in this case, and

if they were held unconstitutional, such holding would by no means invalidate the other provisions of the act.

The judgment appealed from should be affirmed.

COOPER, *C.*

We concur:

GRAY, *C.*
HAYNES, *C.*

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

ANGELLOTTI, *J.*
SHAW, *J.*
LORIGAN, *J.*
VAN DYKE, *J.*

Concurring Opinion.

I concur in the judgment. The title of the act here involved refers to and copies the title of the act which it proposes to amend, and the said title of the act to be amended clearly expresses a definite subject; therefore the title of the amendatory act would have been good without any reference to sections of the act to be amended and the general reference which is made therein to sections is of no consequence. Upon the subject of "revision," the case is not at all within *Lewis v. Dunne*. In that case the title involved commenced with the words "An act to revise." It appeared on the face of the act that it was the result of an act to create a commission "for the revision and reforming of the law;" and the body of the act, with the varied forms of changes made therein, showed that it was, in fact, what it was formally declared to be, a revision.

McFARLAND, *J.*

U. S. WEBB,
Counsel for Appellee.

Supreme Court of the United States.

No. 19.—October Term, 1903.

Burt Ross, Appellant, *vs.* Martin Aguirre, Warden of the State Prison of the State of California, at San Quentin, California.	Appeal from the Circuit Court of the United States for the Northern District of California.

[November 2, 1903.]

Mr. Justice McKenna delivered the opinion of the Court.

Appeal from an order denying a writ of *habeas corpus*. The respondent is the warden of the State prison of the State of California at San Quentin, and holds the petitioner in custody under a judgement of the Superior Court of San Luis Obispo County, State of California, in which court he had been indicted, tried and found guilty of the crime of murder and sentenced to be hanged.

The petition under review is the second presented to the Circuit Court. The first was denied on the ground "that application for relief on behalf of said Burt Ross should first be made to the courts of the State." Thereupon a petition was presented to the Supreme Court of the State of California and denied. A writ of error to this court was also denied. The ground of the petition is that the grand jury by which the indictment was found was not selected in accordance with law, and that therefore his conviction, sentence and commitment do not constitute due process of law, and that he is deprived of his liberty in violation of the Fourteenth Amendment of the Constitution of the United States.

By the constitution of the State of California no person can be held for a crime unless on information, after examination and commitment by a magistrate, or an indictment by a grand jury. (Sec. 8, Constitution of 1879.) By sections 204 to 211, inclusive, of the Code of Civil Procedure of the State, (prior to the amendments hereinafter stated,) it was made the duty of each of the Superior Courts of the State to fix by order, the number of grand jurors and trial jurors required for the transaction of business and the trial of causes during the ensuing year; and it was made the duty of the boards of supervisors of the counties, upon the making of said order, to select from the last preceding assessment roll a list of persons competent and suitable to serve as grand jurors, and also a list of persons to serve as trial jurors, and certify said lists, and place the same with the county clerk, who, upon receiving them, was required to file them

in his office, "and write down the names contained thereon, on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon," and "deposit the pieces of paper having on them the names of the persons selected to serve as grand jurors in a box to be called the 'grand jury box,' and those having on them the names of persons selected to serve as trial jurors in a box to be called the 'trial jury box.'" Grand jurors and trial jurors were required to be drawn respectively from these boxes, by lot, by the clerk in the presence and by order of the court. (Sections 241 and 242, Code Civil Procedure.)

On March 3, 1893, the legislature passed an act entitled "An act to amend sections 204, 205, 206 and 208 of the Code of Civil Procedure." (Stats. Cal. 1893, p. 297.) By this act it is provided that the Superior Court, after making the order stating the number of grand jurors which in its opinion would be required for the business of the court, "shall select and list the grand jurors required by said order to serve as grand jurors in said Superior Court during the ensuing year." It was left the duty of the board of supervisors to select a list of trial jurors. The grand jury which indicted the petitioner was selected under this act. Illegally selected, it is contended, because "it is the law of the State of California that an act with only such a title" is void under the constitution of the State, and that therefore the sections of the Code of Civil Procedure, the substance of which we have given above, remained the law of the State. For this contention petitioner relies on *Lewis* v. *Dunne*, (134, Cal. 291.)

The title of the act passed upon in that case is as follows: "An act to revise the Code of Civil Procedure of the State of California by amending certain sections, repealing others and adding certain new sections." The act was held void under that section of the constitution of the State which provides that "every act shall embrace but one subject, which subject shall be expressed in its title. . . . No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended." The decision was rendered upon a petition for mandamus to a judge of the Superior Court of the city and county of San Francisco, but what action to command does not appear. The petitioner, however, contended that both the title and body of the act showed that the act was intended to be, and was, a revision of the code, and therefore invalid, because the law revised was not "re-enacted and published at length as revised." The court said it could see no sufficient answer to the contention. That contention is not made in the case at bar. The act of 1893 re-enacted and published at length the sections amended and is confined to their amendment. But the act passed upon in *Lewis* v. *Dunne* was also held void because its title did not express its subject—nor, indeed, any subject. "It is apparent," the court said, "that the language of the title of the act in question, in and of

itself, expresses no subject whatever." The words "in and of itself" were used to distinguish an expression of the subject by "reference," and the reference, it was said, was really not to the title of any former act; it was merely to "the Code of Civil Procedure of the State of California." It was asked "Now, what is the Code of Civil Procedure? It is merely a name given to a large part of the general laws of the State. The part of the great body of our laws which is to be found under that name is not confined to any particular subject or subjects, but includes substantive law, criminal law and legislation that might be properly classed under any category whatever, as well as 'civil procedure.'" The reference, therefore, was not to one subject but to many, and the revising act dealt, the court said, "with a vast variety of subjects," many of which were "totally distinct from each other;" and many of them had "no relation to civil procedure, while others were partly procedure and partly substantive law—declaration as to personal and property rights." These observations are certainly not applicable to the act of 1893. That amends sections 204, 205, 206 and 208 by designating them, and re-enacts and publishes them at length. It has but one purpose and contains but one subject. It amends particular sections; it does not revise a whole code.

In *People* v. *Parvin*, (74 Cal. 549,) an act was considered with the following title: "An act to amend section 3481 of the Political Code." The case was not unqualifiedly approved in *Lewis* v. *Dunne*. It was not, however, overruled, and it seems to be an irresistible conclusion from the action of the Supreme Court of the State in denying the application of petitioner, that the act of 1893 was not ruled by *Lewis* v. *Dunne* and was not void under the constitution of the State. We accept the conclusion. It has support, if it need any, in *In re Beach, Constable*, v. *Otto Von Delten, County Auditor of San Joaquin Co.*, decided by the Supreme Court of California, June 26, 1903, where it was held (we quote from the syllabus) that "the title of an amendatory act which gives the title of the original act in full and the number of the section in its amended form is sufficient." *People* v. *Parvin*, *supra*, was cited, and it was observed that that case was discussed in *Lewis* v. *Dunne*, "and distinguished but not overruled." And it was also observed that the Parvin case had been approved in *Francais* v. *Lemps*, (92 Cal. 502.)

Order affirmed. Mandate forthwith.

True copy.

Test:

Clerk Supreme Court, U. S.